



Signed: April 01, 2008

EDWARD D. JELLEN  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re Case No. 07-42354 EDJ  
NESTOR CASTILLO CAYANAN and Chapter 7  
EMILIANA CUNANAN CAYANAN,  
Debtors.

MEMORANDUM RE: MOTION TO DISMISS

On October 9, 2007, Sara L. Kistler, Acting United States Trustee (the "Trustee") moved to dismiss the above-captioned chapter 7 case. The Trustee contends that granting relief to Debtors Nestor Castillo Cayanan and Emiliana Cunanan Cayanan ("Debtors") would be an abuse of the provisions of chapter 7, which therefore merits a dismissal under Bankruptcy Code § 707(b)(2) (presumption of abuse under the "means test") and § 707(b)(3) (totality of the circumstances shows an abuse). The court heard the matter on March 27, 2008. Both the Trustee and Debtors appeared through counsel. The court will deny the Trustee's motion under § 707(b)(2), but grant the Trustee's motion under § 707(b)(3).

Memorandum

1 On July 27, 2007, Debtors filed a petition for relief under  
2 chapter 7 of the Bankruptcy Code. Along with their petition,  
3 Debtors filed a statement of financial affairs and Form 22A  
4 ("original Means Test"). On September 14, 2007, Debtors filed an  
5 amended Form 22A ("amended Means Test"). On March 20, 2008, Debtors  
6 filed a second amended Form 22A ("second amended Means Test"). On  
7 March 28, 2008, after the hearing on the Trustee's motion to  
8 dismiss, Debtors filed an amended statement of financial affairs.

9 The Trustee seeks to dismiss this case under § 707(b)(2),  
10 arguing that the case is presumptively abusive and Debtors have not  
11 rebutted the presumption. She bases her analysis on Debtors'  
12 amended Means Test, which shows an abuse. Debtors argue, however,  
13 that the income figures therein were in error, and that the correct  
14 figures, as set forth in the second amended Means Test, should  
15 control. Under these corrected figures, no presumption of abuse  
16 arises.

17 The court agrees with Debtors. The court cannot use the  
18 original Means Test, as it incorrectly stated that this is a  
19 business case. The amended Means Test correctly states that this is  
20 a consumer case, but incorrectly lists Debtors' rental income. The  
21 Trustee has not presented any evidence disputing the information in  
22 the second Means Test, and has had ample opportunity to obtain and  
23 either challenge or verify the accuracy of such information.  
24 Therefore, the Trustee's motion to dismiss under § 707(b)(2) will be  
25 denied.

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Memorandum

1 The Trustee also seeks to dismiss this case under § 707(b)(3)  
2 following a totality of the circumstances analysis. Section  
3 707(b)(3) states in relevant part, "In considering ... whether the  
4 granting of relief would be an abuse ... the court shall consider  
5 whether ... the totality of circumstances ... of the debtor's  
6 financial situation demonstrates abuse."<sup>1</sup> Both parties agree that  
7 the court may look at pre-petition conduct when determining whether  
8 the case is abusive.

9 Debtors' pre-petition conduct indicates that they were spending  
10 recklessly and without regard to either their deteriorating  
11 financial situation or their creditors. Within two years of filing  
12 their petition, Debtors refinanced four of their five houses. Of  
13 the approximately \$1,850,000 Debtors took out in loans, the Trustee  
14 argues that Debtors may have received as much as \$313,000 in cash.  
15 Debtors do not deny receiving that money. Of major importance to  
16 the court in reaching its decision are the facts that  
17 (a) Debtors failed to disclose those refinances until after the  
18 hearing when they filed their amended statement of financial  
19 affairs, and (b) they have yet to account for the \$313,000.

20 Some of the funds may have been put toward Debtors' purchase of  
21 an \$85,000 Mercedes in November of 2006. The Mercedes purchase  
22 occurred just six months before the Debtors' house in Brentwood was  
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24 <sup>1</sup>The court notes that § 707(b)(3) also contains a provision  
25 dismissing a case filed in bad faith. That issue was not raised  
26 by the Trustee nor briefed by either party, so the court will not  
address it.

1 sold at Trustee's sale. By the end of June 2007, four of Debtors'  
2 five houses had been foreclosed on. The purchase of a luxury  
3 vehicle when Debtors had to have known that they could not afford  
4 their house payments is not the conduct of an honest but unfortunate  
5 debtor, but rather someone attempting to abuse the system.<sup>2</sup>

6 It is true that when Debtors filed this petition under chapter  
7 7, they were not eligible for chapter 13. It is also true that  
8 Debtors may not be able to propose a feasible chapter 11 plan, given  
9 their current income and expenses. Even so, the court believes that  
10 the totality of the circumstances, as described herein, dictates  
11 dismissal. The court will therefore issue its order granting the  
12 Trustee's motion.

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25 <sup>2</sup>This vehicle was just one of five vehicles Debtors owned at  
26 the time they filed their petition.

COURT SERVICE LIST

Michael J. Primus  
Law Offices of Michael J. Primus  
500 Alfred Nobel Dr. #135  
Hercules, CA 94547

Margaret H. McGee  
Office of the U.S. Trustee  
1301 Clay St. #690N  
Oakland, CA 94612-5217

Memorandum

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